

In the Matter of)
)
 Rules and Regulations Implementing) CG Docket No. 05-338
 The Junk Fax Prevention Act of 2005)
)
 Filing by Westfax, Inc. in Response to Report and Order)

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Facsimile advertising is lawful and an established means of communication and advertising. It is beneficial, effective, inexpensive, convenient and prompt. Governmental regulation is to be used sparingly and should not create an unnecessary burden particularly on small businesses.

The effectiveness and value of the TCPA as amended by the JFPA and interpreted by the FCC in its Report and Order is based upon its simplicity, clarity and ease of application. Federal preemption, assignment of TCPA claims and class action lawsuits remain the issues most threatening the effectiveness and value of these laws. These issues need swift clarification and resolution by the FCC.

The JFPA and the TCPA collectively prohibit facsimile advertisements without prior express invitation or permission in writing or otherwise

including a now codified situation where an established business relationship (“EBR”) exists. Presently, there is no time limitation on the EBR.

III C. Notice of Opt-Out Opportunity

Specific identification information is required on each facsimile as well as an opt-out notice.

For simplicity and clarification the FCC should issue a “safe harbor” opt-out notice disclosure; for example:

“The recipient is entitled to request that the sender not send any future unsolicited advertisements to its telephone facsimile machine. Failure to comply within 30 days from the date the request is properly made is unlawful.

800 _____ is the telephone number and _____ is the fax number for the recipient to transfer such request.

An opt-out request by the recipient must identify the telephone number or numbers of the facsimile machines or machines to which the request relates. In addition, the request must be made using the telephone number, facsimile number, website address or email address provided by the sender in its opt-out notice”.

Or another example:

“You may request the sender not to send future faxes to your facsimile machine by calling 800 _____ or faxing _____ and identifying the number of your facsimile machine. Failure to comply with your request within 30 days is unlawful.”

Space is at a premium on the first page of the facsimile message and clear and conspicuous are required so a shorter disclosure is favored.

Conclusion: The recipient is provided on page 1 of each facsimile with a simple, cost-free, anytime “do not fax” request notice he may use to stop future faxes from the sender (advertiser). Senders must comply with such requests within 30 days after the request is made.

III D 2. Third Parties and Fax Broadcasters

The FCC correctly concluded (Paragraph 38) the sender/advertiser is responsible for complying with the opt-out notice requirements and for honoring opt-out requests. The “sender” is the person or entity on whose behalf the advertisement is sent. Regardless of whether the sender includes its own contact information in the opt-out notice or the contact information of a third party retained to accept opt-out requests, the sender is liable for any violations of the rules.

Third party agents, including fax broadcasters, need only accept and forward do-not-fax requests to the extent of the underlying business contracts out such responsibilities to them. Thus, the FCC makes it clear third party agents, including fax broadcasters, may provide these services without being liable for violations or being held to be “highly involved”.

Despite any direction to do so in the JFPA or any request thereafter, the FCC added Paragraph 40 to its Report and Order. Paragraph 40 is well out of the boundaries of what the FCC was directed to do in the JFPA. Paragraph 40 has a number of shortcomings.

Although it is understood that historically renegade fax broadcasting companies sold lists and made representations that fax broadcasting was “legal” and/or the lists were “clean”, this is not the case today. Senders are well aware of the 15 year old TCPA statute and the FCC rules and regulations. Reputable fax broadcasters are leaders in educating and disclosing to senders the basic requirements to comply with such laws. Fax broadcasters should be encouraged to continue in such efforts.

1. The FCC’s current rule for fax broadcaster liability for an unsolicited fax does not definitively state that “supplying fax numbers” by itself makes the fax broadcaster liable for any unsolicited advertisements faxed to consumers and businesses without their prior express invitation or permission.
 - a. The TCPA and JFPA do not expressly provide for this interpretation by the FCC.
 - b. Relevant court cases are far from uniform on the issue of what constitutes “a high degree of involvement”.
 - c. Each case must be determined by its own facts and circumstances.

In the absence of a clear discussion and hearing on this issue, the FCC should not make such general summary conclusions.

2. The FCC’s makes a finding that “a fax broadcaster that provides a source of fax numbers, makes representations about the legality of

faxing to those numbers or advises a client about how to comply with the fax advertising rules, also demonstrates a high degree of involvement in the transmission of those facsimile advertisements.”

- a. The FCC does not supply a basis, factual setting or any other explanation for its finding (Note such a finding was not requested).
- b. There is no definition, explanation or knowledge requirement for the phrase “provides a source of fax numbers”. Conglomerates that may interact with fax broadcasters and clients and have fax numbers;
- c. Although the FCC probably means to stop companies from selling lists and representing they are legal, the finding is worded inarticulately and may be interpreted much differently by other parties.
- d. The use of “or” appears to make fax broadcasters liable for any of the above listed actions instead of for the collective action perceived as an abuse by the FCC and therefore most concerned about.
- e. As written “or advises a client about how to comply with the fax advertising rules” is incredibly vague and broad and could be interpreted to mean simply providing a copy of the applicable rules or posting such law and/or rules on a website or even a link to such rules.
- f. As stated above, fax broadcasters are now part of the solution to the issues the TCPA/JFPA seeks to regulate. There is no other example where a party is held liable for attempting to help another party comply with the law. Fax broadcasters should be encouraged to take an active role with their clients on basic compliance and uniformity with such things as the identification requirements and opt-out notices as well as the transmission of such requests by fax broadcasters to senders as sanctioned by the FCC.

This finding is not consistent with the directions of the JFPA and should not be casually discussed and summarily included in the Report and Order. Third parties, including fax broadcasters are entitled to a forum, factual findings, discussion and due process before such sweeping statements are made.

The activities of fax broadcasters have changed dramatically in the 21st century. Fax broadcasters typically do not supply data or content or otherwise partner with their clients in the fax broadcast of messages. High involvement cases are exceedingly rare. The substantial majority of fax broadcasters comply with the law fully and make bona fide efforts to give their clients basic information on compliance with the fax advertising rules.

Read literally, “or advises a client about how to comply with the fax advertising rules” could mean anything, including any legal and proper assistance for a client, no matter how insignificant, with compliance with the advertising rules. It might mean simply referring a client to the TCPA/JFPA laws. The reward for such genuine effort would be joint and several liability for any violation of the rules by the sender and a new business practice of fax broadcasters not to provide any help or guidance.

As a result, Westfax requests that Paragraph 40 of the Report and Order, and in particular the findings, be rescinded and deleted and that the FCC issue at a later date further guidance as to what permissible actions may be taken by third parties, including fax broadcasters to assist and advice senders with compliance with the fax advertisement rules. These subsequently issued findings should be expressed affirmatively and positively and clarify that any person, including a fax broadcaster may help another person, including a client comply with a law, including the TCPA/JFPA without being held jointly and severally liable for any subsequent violations by the client. Any abuses, the FCC wishes to address in this area should be distinctly prohibited with particularity.

Respectfully Submitted

WESTFAX, INC.